COURT. U. S.
NOV 21 19
MICHAEL ROBAK, JR.

Supreme Court of the United States

October Term, 1973

No. 73-327

STATE OF OHIO *ex rel.*, RONNIE WOODBURY and THOMAS WOODBURY,
Petitioners,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney of Wood County, Ohio,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

DANIEL T. SPITLER
Prosecuting Attorney of Wood County
Wood County Court House
Bowling Green, Ohio
Ph: (419) 352-6531
Respondent

Prepared by:
JAMES L. MANNING, *Legal Intern*
University of Toledo

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-8647

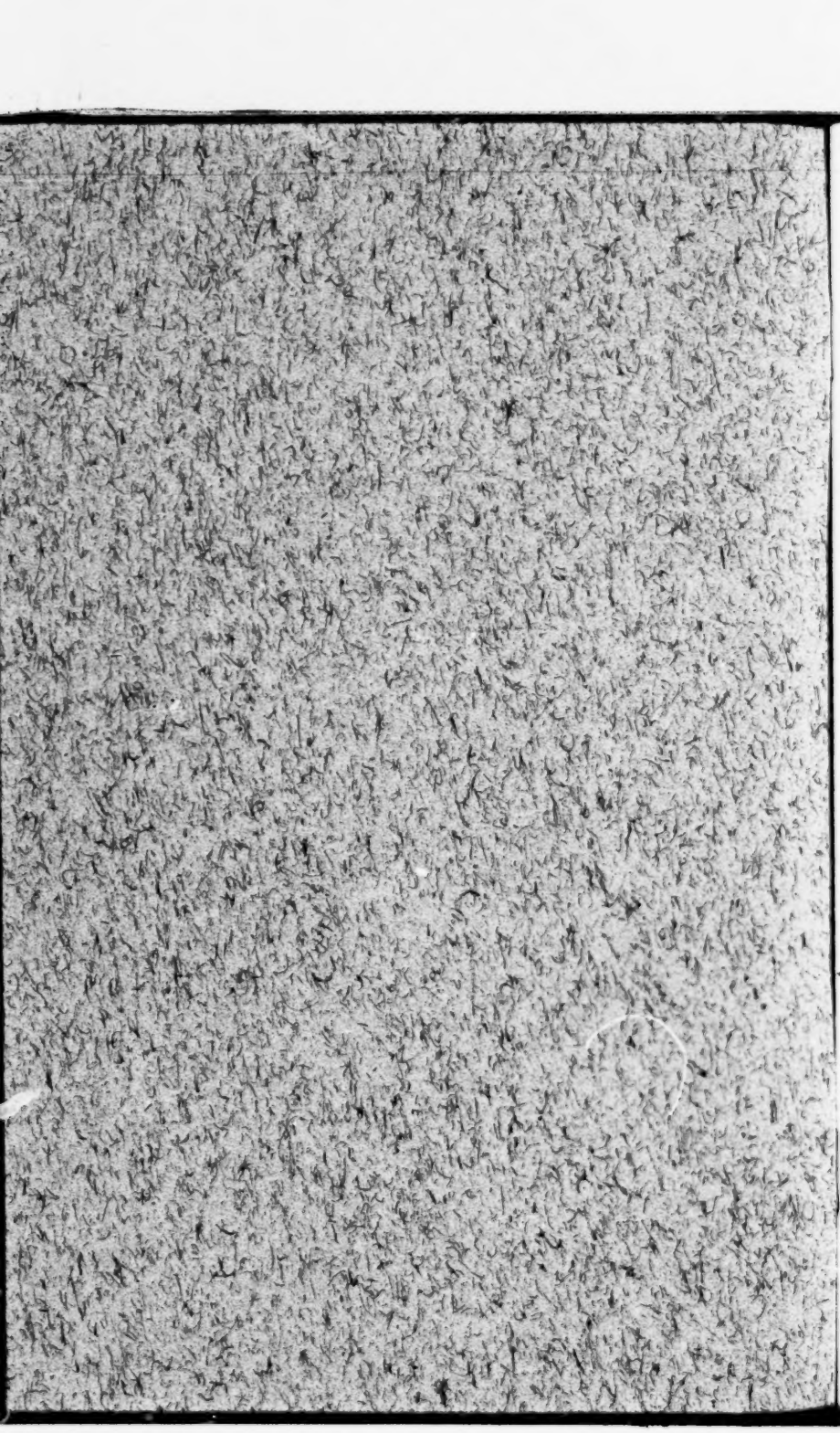


TABLE OF CONTENTS

Table of Authorities II

Statement of Facts 1

Reasons for Denying the Writ 2

1. The Respondent, as Prosecuting Attorney for Wood County, Ohio, stands ready and willing to fulfill his part of the original bargain. Therefore, Petitioner's due process rights under *Santobello* are not violated 2

2. The Petitioners have not exhausted their state remedies 4

Conclusion 4

Exhibits:

A. Letter from Petitioner's attorney to Judge Coller 5

B. Transcript of hearing where Judge Coller withdrew Petitioner's pleas 8

C. Affidavit of Respondent 11

D. Plea of Co-defendant 13

E. Journal Entry—Plea of Co-defendant 15

F. Journal Entry—Probation of Co-defendant 17

G. Journal Entry—other counts nollied 18

TABLE OF AUTHORITIES

Cases

Greene v. United States, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957) ---------- 3

Santobello v. New York, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971) ---------- 2, 3

Constitutions

United States Constitution:

Fifth Amendment ---------- 3

Supreme Court of the United States

October Term, 1973

No. 73-327

STATE OF OHIO *ex rel.*, RONNIE WOODBURY and THOMAS WOODBURY,

Petitioners,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney of Wood County, Ohio,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF FACTS

On December 21, 1970, the petitioners, Ronnie Woodbury and Thomas Woodbury agreed to plead guilty to one count of a multi-count indictment then pending against them and to cooperate with the prosecutor in the further investigation of corruption within the Bowling Green Police Department. In consideration of this promise, the prosecutor, the respondent herein, agreed to *nolle prosequi* the other counts in the indictment after the petitioners had plead guilty and been sentenced. (The respondent prosecutor's practice was to *nolle prosequi* only after sentencing in order to prevent a fraud on the prosecutor's

office by a defendant who would withdraw his guilty plea after the other charges have been dropped).

On December 31, 1970, the petitioners' attorney sent Judge Coller a letter (see Exhibit A) allegedly "confirming" the agreement made between the petitioners' attorney and the respondent. Subsequently, the petitioners each pleaded guilty to a single charge of receiving stolen property on January 4, 1971. On January 5, 1971, Judge Coller received the letter mentioned before. Judge Coller, on February 1, 1971, withdrew petitioners' guilty pleas on his own motion. (See Exhibit B.)

On March 4, 1971, the cases involving the petitioners were transferred by Judge Coller to Judge Kenneth Adams also of the Wood County Ohio Common Pleas Bench. Subsequently, the petitioners refused to plead guilty to the one count as agreed in the original bargain. Three months after the transfer, the court orderd that all counts of the original indictment against the petitioners be set down for trial on July 20, 1971.

Since July of 1971, petitioners have sought both a writ of prohibition and a writ of mandamus (the origin of this action) in order to force the respondent to drop the charges against the petitioners.

REASONS FOR DENYING THE WRIT

1. The Respondent, as Prosecuting Attorney for Wood County, Ohio, stands ready and willing to fulfill his part of the original bargain. Therefore, Petitioner's rights under Santobello are not violated.

In *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971), this court held that if a prosecutor failed to perform his promises under an agreement with the defendant for a guilty plea, the state court should grant

the defendant either "specific performance of the agreement" or "the opportunity to withdraw his plea of guilty." 404 U.S. at 263.

It is the state's position that the facts in this case have not developed to the point where *Santobello* is controlling. The petitioners have not in effect plead to anything. They did plead guilty to one count of the indictment, but the trial court, in its discretion and on its own motion, set aside these pleas because they "were not voluntary and made with full knowledge of all the facts and law." (Exhibit B, p. 3).

The petitioner suggests that the only relief sought is specific performance of the original bargain. The respondent must point out that he has been continually ready and willing to uphold his promise if and when the petitioners plead guilty to the agreed charge and are sentenced thereunder. (See Exhibit C which is an affidavit submitted by the respondent in the original suit for a writ of prohibition brought by the petitioners.) Also, it must be pointed out to the court that one of the petitioners' original co-defendants did plead guilty as per this agreement, and the other counts against that defendant were dropped. (See Exhibits D, E, F, and G.)

Lastly, at to *Greene v. United States,* 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957), the respondent agrees that the Fifth Amendment to the United States Constitution does protect an individual from the hardships of trial and possible conviction more than once for an alleged offense. However, the petitioners have never been to trial in these cases. The petitioners, by means of this petition and other previous pre-trial motions, have prevented this case from coming on trial for more than two years. The petitioners do not seek to prevent double jeopardy; they seek to prevent any jeopardy whatsoever.

2. The Petitioners have not exhausted their state remedies.

The respondent does not quarrel with the petitioners' argument that if the prosecutor refuses to perform as agreed in the original bargain that the petitioners' constitutional rights will be violated. However, the facts of this case readily point out that the prosecuting attorney cannot breach this agreement until the petitioners plead guilty to the one count in the original agreement. (Until they do, the respondent has a duty to continue prosecuting these cases until they are resolved.) If, after submitting their pleas of guilty and being sentenced, the respondent did not *nolle prosequi* the other counts, the petitioners would have the remedy of moving to quash the remaining indictments.

Also, for this court to render an opinion on this question before the petitioners have pleaded and the prosecutor has breached, would be to render the petitioners an advisory opinion as to what their rights *may be if* the respondent fails to perform as he promised. Clearly, this raises a non-justiciable question for which the petitioners have no standing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL T. SPITLER
Prosecuting Attorney
Wood County, Ohio

EXHIBIT A

HANNA, MIDDLETON & ROEBKE
Bowling Green, Ohio 43402

December 31, 1970

The Hon. Floyd A. Coller
Common Pleas Court
Wood County Court House
Bowling Green, Ohio 43402

RE: State vs. Ronnie Woodbury, No. 5790
State vs. Ronnie Woodbury, No. 5791
State vs. James Falls, No. 5792
State vs. Thomas Woodbury, No. 5793

Dear Judge Coller:

In regard to the above captioned cases, this is to confirm the previous understanding between you, I, and Daniel T. Spitler, Wood County Prosecutor, as to the imposition of sentences.

In this respect, Ronnie Woodbury is to plead guilty to one felony, to-wit: receiving stolen property, and the remaining three counts of receiving stolen property are to be dismissed at the request of the prosecutor. In addition, Mr. Woodbury is to be sentenced to the Ohio State Reformatory and will be released from that institution and placed on probation by you approximately six months after he has entered his foregoing plea of guilty and that in furtherance of this, I am to file a Motion for "shock" probation.

In regard to James Falls, he is to enter a plea of guilty to one count of breaking and entering an uninhabited dwelling in the nighttime, and the remaining similar account is to be dismissed at the request of the prosecutor.

In return, Mr. Falls is to be sentenced to the Ohio State Reformatory and that you will release him approximately eight (8) months after entering the foregoing plea of guilty upon my filing the appropriate motion for "shock" probation.

In regard to Thomas Woodbury, he is to enter a plea of guilty to one charge of breaking and entering an uninhabited dwelling in the nighttime and the remaining two similar accounts are to be dismissed by the request of the prosecutor. In return, Mr. Woodbury is to be sentenced to the Ohio State Penitentiary and is to be released approximately eight (8) months after entering the foregoing plea upon my filing the appropriate motion for "shock" probation.

It is further understood that Ronnie Woodbury, James Falls, and Thomas Woodbury will cooperate with and assist the office of the Wood County Prosecutor in furtherance of obtaining convictions against other law enforcement officials involved in the foregoing offenses or similar offenses in Wood County, Ohio. In this respect, it is understood that there will be no further prosecution commenced or indictments retained against Ronnie Woodbury, James Falls, or Thomas Woodbury, arising or connected directly or indirectly out of their cooperation with the Wood County Prosecutor's Office.

It is further understood that these defendants shall pay the costs of these proceedings and that based upon their cooperation, you will consider at a later date their possible earlier release than has been indicated heretofore, but that no specific promise is made in this respect.

In sentencing the foregoing defendants, it is understood that you shall recommend to the respective institution that the defendant being sentenced there be trans-

ferred to one of the honor institutions under the control of the Ohio State Correctional Authority.

Cordially yours,

HANNA, MIDDLETON & ROEBKE
M. SHAD HANNA
Attorney for Ronnie Woodbury, James Falls and Thomas Woodbury

cc: MR. DANIEL T. SPITLER
Wood County Prosecuting Attorney

EXHIBIT B

(Certification of copy omitted in printing)

Nos. 5791, 5792, and 5793

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

STATE OF OHIO
Plaintiff,

vs.

THOMAS WOODBURY, RONNIE WOODBURY, JAMES FALLS,
Defendants.

The above-captioned cases came on for hearing on setting aside the pleas on Monday, February 1, 1971, at 3:16 p.m., before the Hon. Floyd A. Coller, Judge of the above-court.

APPEARANCES:

DANIEL SPITLER, ESQ.
Prosecuting Attorney
Court House
Bowling Green, Ohio 43402
M. SHAD HANNA, ESQ.
161 North Main Street
Bowling Green, Ohio 43402

The Court: Case of State of Ohio against Ronnie Woodbury, Number 5791, State of Ohio against James Falls, Number 5792, State of Ohio against Thomas Woodbury, Number 5793. You may all three stand up.

Gentlemen, on January the 5th, 1971, I received by certified mail a letter from your attorney, which has disturbed me for some time, which I debated and considered for some time just what I should do about it. This letter stated in part, "in regard to the above-captioned cases, this

is to confirm the previous understand between you, I and Daniel Spitler, Wood County Prosecutor, as to the imposition of sentences." The letter then sets forth in separate paragraphs what your attorney apparently believed I had agreed I would do if each of you plead guilty to the charges in certain counts in the above-numbered cases.

I am therefore afraid that each of you, when you entered your plea and even now, may believe that I made certain promises as to just what would happen if you plead guilty. I wish to inform you now and I can't be too emphatic about it, that I did not, cannot, never have and will not promise any person, when he offers to plead guilty what the results as to his sentence, probation or any other results will be.

The only person who has a right to do what is called plea-bargaining is the Prosecuting Attorney. He can guarantee you nothing. He cannot bind this Court or any Court as to what the Court will do after a plea. He can and often does make recommendations to the Court. He can agree with your attorney or you that he will make certain recommendations. He cannot and does not pledge to your attorney, you or anyone else that the Court will follow all or any of his recommendations.

I will say this, that the Court has and often does follow his recommendations; but until the Court has acquainted himself with all the facts of the case, has received a report from the probation officer and so forth, he cannot and does not say whether he will probate any defendant, sentence him or release him on shock treatment at a later date.

From that letter, I take it that your attorney may have thought that the Prosecuting Attorney or perhaps even I was guaranteeing each of you just what would happen to you if you plead guilty. I would only account it to inexperience on the part of your attorney for I ques-

tion whether he would do it intentionally. He should know that anything the Prosecuting Attorney would say when discussing the cases with him would not bind the Court and that any conversations that may have taken place in the presence of the Court between himself and the Prosecuting Attorney cannot—can in no way be taken as an understanding or an agreement between the Court, himself and the Prosecuting Attorney.

For that reason, I have come to the conclusion that perhaps your pleas were not voluntary and made with full knowledge of all the facts and law. I am therefore at this time setting aside your former pleas of guilty in each of your cases and counts to which you formerly plead guilty. I want you to consult with your attorney or any other attorney, if you so choose; and at a later date, I will bring you back for rearraignment upon the indictments and your answers on the matter of your pleas.

This applies to each of you individually and you're now released to the jail for rearraignment at a later date.

Mr. Hanna: Your Honor, in this respect—

The Court: Just a minute. I haven't asked for any question. You heard what I said.

Mr. Hanna: I think they are entitled to bond if you're setting aside—

The Court: They are entitled to bond.

Mr. Hanna: We would request the same bond as before.

The Court: They can make that request, yes.

Mr. Hanna: They are making it now for the same bond that was set before.

The Court: The bond will be fixed as before.

Mr. Hanna: Thank you, your Honor.

The Court: They may be remanded to jail.

(At this time the hearing ended. 3:23 p.m.)

(Certificate of Reporter omitted in printing)

EXHIBIT C

No. 5790

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

STATE OF OHIO

vs.

RONNIE WOODBURY

AFFIDAVIT

(Filed October 11, 1972)

State of Ohio,
County of Wood, ss:

Daniel T. Spitler, Prosecuting Attorney of Wood County, Ohio, being first duly sworn on oath deposes and says that Ronnie Woodbury was indicted by the September 1970 Term of the Wood County Grand Jury on four counts of receiving stolen property, which are the charges contained in cases numbered 5790 and 5791.

Affiant further states that he and counsel for the defendant, M. Shad Hanna, entered into plea bargaining with the result that the defendant, Ronnie Woodbury, was to plead guilty to one count of the two indictments and after sentencing of Ronnie Woodbury, affiant agreed to file a motion with the Court to nolle prosequi the remaining three counts in cases numbered 5790 and 5791.

Affiant further states that he will comply with all the provisions of the plea bargaining agreement which were set forth in a letter dated December 31, 1970, from M. Shad Hanna, attorney for defendant, Ronnie Woodbury,

to the Honorable Floyd A. Coller, Judge of the Common Pleas Court, Wood County, Ohio; a copy of the letter is attached to this affidavit and made Exhibit "A".

Affiant further states that the State of Ohio is prepared to proceed with prosecution of cases numbered 5790 and 5791 and will not use as evidence against the defendant any statements or admissions or evidence resulting from such statements or admissions given by the defendant to the prosecution as a result of plea bargaining.

Affiant further states that this affidavit is filed with this Court pursuant to a mandate of the Ohio Supreme Court in the case of *State of Ohio, ex rel, Woodbury, et al, v. Coller, et al,* (1972) 31 Ohio St. 2d 195.

Further affiant saith not.

/s/ DANIEL T. SPITLER,
Affiant
(Jurat omitted)

EXHIBIT D

(Certification of copy omitted in printing)

No. 5792

IN THE COMMON PLEAS COURT
OF WOOD COUNTY, OHIO

STATE OF OHIO

vs.

JAMES FALLS

PLEA OF GUILTY

I, James Falls, defendant in the above cause, being now in open court and having been fully advised by the court of my rights under the Constitutions of the United States and the State of Ohio, and the laws of this State, and that such plea constitutes an admission which may be used against me at a later trial, and recognizing my right to a trial by jury, and receiving no promise in return for my plea, and having been fully informed by my counsel and by the Court of the charge against me, do hereby:

* * * * *

2. Waive my right to a trial by jury and withdraw my former plea of not guilty to the count of the indictment and enter a plea of guilty to O.R.C. §2907.10 (Breaking and Entering), first count only.

I have been advised that the penalty for this offense is (are) 1-15 years.

Dated this 2 day of December, 1971.

/s/ JAMES FALLS
Defendant

Signed in the presence of:
/s/ KENNETH H. ADAMS
Judge

Prosecuting Attorney
/s/ ROBERT W. MAURER
/s/ M. SHAD HANNA

EXHIBIT E

(Certification of copy omitted in printing)

No. 5792

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

STATE OF OHIO

vs.

JAMES FALLS

JOURNAL ENTRY
December 2, 1971

This day came Robert W. Maurer, Assistant Prosecuting Attorney, on behalf of the State of Ohio, and also came the defendant, James Falls, with his attorney, M. Shad Hanna.

Thereupon said defendant withdrew his plea of not guilty to the first count of said indictment, heretofore entered herein and was rearraigned on said indictment.

The court thereupon advised the defendant of the status of the charge against him and advised the defendant of his state and federal constitutional rights. Thereupon the Assistant Prosecuting Attorney moved pursuant to Ohio Revised Code Section 2941.30 and 2941.08 that the indictment in this cause be amended to read that the offense occurred on August 23, 1970 on both counts thereof. Defendant by and through his attorney consented to the said amendment.

The Court having advised the defendant of his right to a jury trial pursuant to Section 2945.05 of the Ohio Revised Code, and the defendant in writing waived the same.

The Court then advised the defendant of his further constitutional rights and of the consequences of a plea of guilty and then asked the defendant to plead to the indictment, and for plea, defendant says he is guilty as charged, to the first count.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that this matter be referred to the Probation Officer for pre-sentence investigation and report. It is further ordered, that the bond be continued and the defendant released until further notice from the court.

/s/ KENNETH H. ADAMS
Common Pleas Judge

Approved:
/s/ ROBERT W. MAURER
/s/ M. SHAD HANNA

EXHIBIT F

(Certification of copy omitted in printing)

No. 5792

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

STATE OF OHIO
vs.
JAMES FALLS

JOURNAL ENTRY
January 10, 1972

This day came Peter D. Gwyn, Assistant Prosecuting Attorney, on behalf of the State of Ohio, and also came the defendant, James Falls, with his attorney, M. Shad Hanna. This matter was then heard on the report of the Probation Officer.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that sentence be deferred and that the defendant be placed on probation for a period of 2 years. The terms of said probation shall be that said defendant have no association with Howard Lashuay, James Beaupre, Ronnie Woodbury, Thomas Woodbury, and Matthew Brichta and pay the costs of this prosecution.

It is further ordered that said bond for defendant's appearance be released.

/s/ KENNETH H. ADAMS
Common Pleas Judge

DANIEL T. SPITLER
Prosecuting Attorney,
/s/ DANIEL T. SPITLER

EXHIBIT G

(Certification of copy omitted in printing)

No. 5792

IN THE COURT OF COMMON PLEAS
OF WOOD COUNTY, OHIO

STATE OF OHIO
vs.
JAMES FALLS

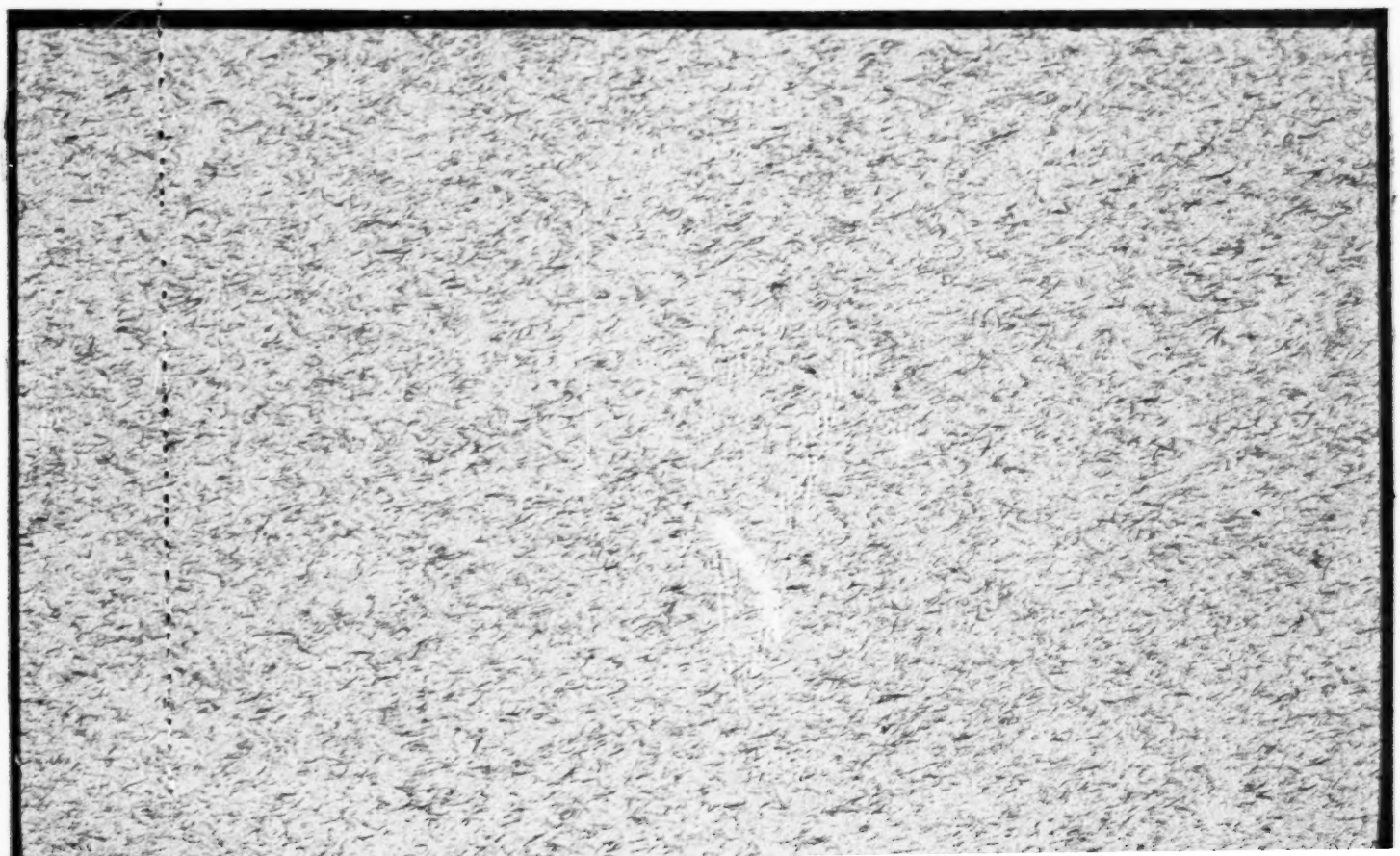
JOURNAL ENTRY
January 10, 1972

This day came Robert W. Maurer, Assistant Prosecuting Attorney on behalf of the State of Ohio, and also came the defendant, James Falls, with his attorney, M. Shad Hanna.

This matter then came on for consideration of an oral motion of the Prosecuting Attorney for a nolle prosequi to the second count as stated in the indictment, and the Court, being fully advised in the premises, finds said motion well taken and the second count is hereby ordered nollied by the Court.

/s/ KENNETH H. ADAMS
Common Pleas Judge

DANIEL T. SPITLER
Prosecuting Attorney,
/s/ ROBERT W. MAURER



SUPREME COURT, U. S.

JAN 10 19

MICHAEL RODAK, JR.

Supreme Court of the United States

October Term, 1973
No. 73-327

STATE OF OHIO, *ex rel.* RONNIE WOODBURY and THOMAS WOODBURY,
Petitioners,

v.

DANIEL T. SPITLER, Prosecuting Attorney of Wood County, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

M. SHAD HANNA
HANNA & HANNA
700 North Main Street
Bowling Green, Ohio 43402
(419) 352-6501
Attorney for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Statement 1
Opinion Below 2
Jurisdiction 2
Questions Presented for Review 2
Constitutional Provisions Involved 4
Statement of Facts 5
Reasons for Granting Writ 7
Conclusion 11

Appendix:

Decision on Merits of Court of Appeals 13
Opinion of Ohio Supreme Court 15
Decision on Merits of Ohio Supreme Court 20
Decision on Rehearing of Ohio Supreme Court 21
Mandate of Ohio Supreme Court 22

AUTHORITIES CITED

Cases

Green v. United States, 355 U.S. 184 10
Stantobello v. New York, 404 U.S. 257 .....3, 4, 7, 8, 9, 10, 11

Constitutions and Statute

Ohio Constitution:

Article I, Section 10 ..... 3, 4
Article I, Section 16 .....3, 4, 5

United States Constitution:

Fifth Amendment 2, 3, 4, 9, 10
Fourteenth Amendment, Section 1 .....2, 3, 4, 9

28 U.S.C. 1257(3) 2

Supreme Court of the United States

October Term, 1973
No. 73-327

STATE OF OHIO, *ex rel.* RONNIE WOODBURY and THOMAS WOODBURY,
Petitioners,

v.

DANIEL T. SPITLER, Prosecuting Attorney of Wood County, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

STATEMENT

The petitioners, Thomas Woodbury and Ronnie Woodbury, pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Ohio, rendered on June 14, 1973, which unanimously affirmed the order of the Court of Appeals of Wood County, Ohio dismissing petitioners' petition for writ of mandamus requiring the respondent to dismiss certain criminal indictments pending against the petitioners in the Common Pleas Court of Wood County, Ohio, pursuant to a plea bargain agreement entered into by the petitioners and respondent.

OPINION BELOW

No opinion was rendered by the Court of Appeals of Wood County, Ohio in dismissing the petitioners' petition for writ of mandamus. A copy of the decision and order of that Court is annexed hereto and marked Exhibit A.

A copy of the opinion of the Supreme Court of the State of Ohio, affirming the order of dismissal of the petitioners' petition for writ of mandamus by the Court of Appeals of Wood County, Ohio, is annexed hereto and marked Exhibit B. A copy of the order of that Court issued upon its opinion is annexed hereto and marked Exhibit C. A copy of the order of that Court denying petitioners' motion for rehearing is annexed hereto and marked Exhibit D. A copy of the mandate of that Court issued upon its opinion and order is annexed hereto and marked Exhibit E.

JURISDICTION

The order or judgment of affirmance, the order or judgment of denial of rehearing and the mandate of the Supreme Court of the State of Ohio, were all entered on June 14, 1973. This petition for certiorari was filed within 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioners, Thomas Woodbury and Ronnie Woodbury were denied due process of law under the Fifth and Fourteenth Amendments of the United States

Constitution and the Tenth and Sixteenth Sections of Article I of the Ohio Constitution when they were fraudulently induced to plead guilty, give sworn statements and submit to polygraph tests upon the promises of Judge Floyd A. Coller and/or the respondent, (Prosecutor) Daniel T. Spitler, that there would be no further proceedings in the remaining criminal indictments pending against the petitioners, when such indictments have not been dismissed, but have repeatedly been set for trial, only to be stayed by the appeal actions of the petitioners?

2. Whether the order and mandate of the Supreme Court of the State of Ohio, affirming the decision of the Court of Appeals of Wood County, Ohio, to dismiss the petitioners' petition for writ of mandamus requiring the respondent to dismiss the remaining criminal indictments pending against the petitioners is consistent with the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and the Tenth and Sixteenth Section of Article I of the Ohio Constitution?

3. Whether the judge, Honorable Floyd A. Coller, and the prosecutor (respondent Daniel T. Spitler), are required to perform the promises which they made to the petitioners as part of a plea bargain and upon which the petitioners relied in pleading guilty, giving sworn statements and submitting to polygraph tests, all of which has acted to the jeopardy of the petitioners? (*Santobello v. New York*, 404 U.S. 257.)

4. Whether the petitioners are denied due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and the Tenth and Sixteenth Sections of Article I of the Ohio Constitution by first having to submit to trial, conviction and sentencing

before they are entitled to have their plea bargain agreement enforced which prohibits such trial, judgment and punishment? (*Santobello v. New York*, 404 U.S. 257.)

5. Whether the fact that the respondent, a public prosecutor, has induced the petitioners, the defendants, to plead guilty to one criminal count by false promise to dismiss the remaining criminal counts, *ipso facto*, required dismissal of the remaining criminal counts, when the petitioners cannot be returned to their *status quo ante* due to their "confessions" given as a result of such plea bargain agreement?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Constitution of the United States, Amendment XIV, Section 1:

> "* * * nor shall any state deprive any person of life, liberty or property without due process of law * * *."

Constitution of the State of Ohio, Article I, Section 10:

> "* * * No person shall be compelled, in any criminal case, to be a witness against himself * * *."

Constitution of the State of Ohio, Article I, Section 16:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

STATEMENT OF FACTS

On December 21, 1970, during the September, 1970, term of court, petitioners, Ronnie Woodbury and Thomas Woodbury, and the Honorable Floyd A. Coller, Judge of the Wood County Common Pleas Court, and respondent Daniel T. Spitler, Prosecuting Attorney for Wood County, Ohio, agreed to petitioners receiving immunity from prosecution as to all counts except one count of the multiple criminal indictments then pending against petitioners in the Common Pleas Court of Wood County, Ohio. This was to be accomplished at such time as petitioners entered a plea of guilty to the remaining one count of the indictments, by the motion of respondent, Daniel T. Spitler, to *nolle prosequi* said other counts to which the Honorable Floyd A. Coller agreed to consent and approve.

On January 4, 1971, during the January, 1971, term of court, each of petitioners in consideration of and reliance on the foregoing agreement with the Honorable Floyd A. Coller and respondent Daniel T. Spitler, entered a plea of guilty to one count, were remanded to jail and thereafter cooperated with the Honorable Floyd A. Coller and respondent Daniel T. Spitler, in their investigation and prosecution of other persons suspected of being involved in the same or similar criminal activity, by voluntarily giving sworn statements, submitting to polygraph tests and appearing at court to testify against these other suspects.

On March 4, 1971, during the January, 1971, term of court, the cases involving petitioners were transferred by the Honorable Floyd A. Coller to the Honorable Kenneth H. Adams of the Wood County Common Pleas Court in an effort to abrogate the plea bargain agreement entered into by the parties herein.

On September 27, 1972, during the September, 1972, term of court, the Honorable Kenneth H. Adams, at the request and insistence of the Honorable Floyd A. Coller and respondent Daniel T. Spitler, ordered that the remaining counts of the original indictments against petitioners be set down for immediate trial on October 18, 1972, in violation of the plea bargain agreement. Consequently, petitioners filed their petition for a writ of mandamus in the Court of Appeals for Wood County, Ohio, which now forms the basis for this petition for certiorari. It should be noted that previous thereto on July 20, 1971, and subsequent thereto on February 1, 1973, in violation of the plea bargain agreement, trial dates were also set at the request of Prosecutor Spitler on the same remaining counts. However, these dates were vacated after the petitioners were able to obtain various stays in lower appellate courts.

It should also be noted that James Falls, who was co-defendant in the Wood County Common Pleas Court, along with petitioners herein, is not a party to this petition. The reason for this is that respondent, prior to the filing of the petition for writ of mandamus in the Court of Appeals of Wood County, Ohio, performed his part of the agreement as hereinbefore set forth, granting James Falls immunity by dismissing all counts of the indictment against him except one for which he was placed on probation. Thus the plea bargain agreement which was entered

into by all three defendants has been fulfilled by Prosecutor Spitler in regard to Mr. Falls only.

REASONS FOR GRANTING WRIT

1. The decision below directly conflicts with the due process principles enunciated in this Court's Santobello ruling.

To briefly review the facts, petitioners and respondent agree that a "plea bargain" was reached between them with the approval of the presiding Judge, wherein petitioners were to plead guilty to one criminal count and respondents were to dismiss the remaining counts of the criminal indictments. Petitioners and respondent further agree that petitioners did so plead guilty in reliance upon such promises of the respondent and that the respondent has not dismissed the remaining counts, but instead has insisted that petitioners must stand trial on same.

In *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971), this court set forth the requirement of enforcement of promises of a prosecutor relied upon by a defendant pursuant to a "plea bargain" as follows at 404 U.S. 262:

> "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, *but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.*" (Emphasis ours.)

Herein, the petitioners not only entered pleas of guilty in reliance upon the promises of the respondent, but they also stripped themselves of any possible defense in any subsequent criminal proceeding by giving the respondent sworn statements, submitting to polygraph tests conducted by respondent and testifying for the respondent.

In regard to the type of relief which a defendant is entitled to upon default of a prosecutor's promise, this court in *Santobello* set forth the alternatives available to a defendant as follows:

> "* * * The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case *require* only that there be *specific performance of the agreement on the plea,* * * * or whether, in the view of the state court, the circumstances *require granting the relief sought by petitioner,* * * *." (Opinion of the court by Mr. Chief Justice Burger, at 404 U.S. 263) (Emphasis ours.)
>
> * * * * * *
>
> "I join the opinion of the Court and *favor a constitutional rule for this as well as for other pending or oncoming cases.* Where the 'plea bargain' is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether *Due Process requires (a) that there be specific performance of the plea bargain* or (b) that the defendant be given the option to go to trial on the original charges. One alternative may do justice in one case, and the other in a different case. *In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight* inasmuch as the fundamental rights

flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State." (Concurring opinion of Mr. Justice Douglas, at 404 U.S. 267) (Emphasis ours.)

* * * * *

"I agree with much of the majority's opinion, but conclude that petitioner must be permitted to withdraw his guilty plea. *This is the relief petitioner requested* and, on the facts set out by the majority, *it is a form of relief to which he is entitled.*

"* * * (w)here the prosecutor has broken the plea agreement, it may be appropriate to permit the defendant to enforce the plea bargain. But that is not the remedy sought here. * * *" (Concurring opinion of Mr. Justice Marshall joined in by Mr. Justice Brennan and Mr. Justice Stewart, at 404 U.S. 267-268) (Emphasis ours.)

Thus, it would appear that a majority of this court believes that in cases similar to *Santobello,* the relief requested by the defendant should generally be granted.

Since the petitioners do not desire to have any plea vacated, the only question should be what further type of relief are the petitioners entitled to, i.e., specific performance of the plea bargain agreement or the relief requested by petitioners. However, this is easily resolved in view of the fact that *the relief sought by the petitioners is specific performance* by the respondent of his promises. Thus the alternatives presented to the petitioner in *Santobello,* are in this case merged into only one course of relief which must be accorded to the petitioners. The denial of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution to the peti-

tioners is consequently the result of the respondent's failure to accord the petitioners the relief to which petitioners are entitled by insisting that the petitioners must either enter into a *new* "plea bargain" or go to trial on the original charges. To require the petitioners to enter into a new "plea bargain" is to ask the petitioners to place their faith, repudiated once already, in the promises of the respondent and flies in the face of the law of *Santobello*. To require the petitioners to go to trial after having entered a plea of guilty is to abrogate the philosophy supporting the provision of the Fifth Amendment of the United States Constitution against double jeopardy as set forth by this court in *Green v. United States*, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957) as follows at 335 U.S. 187-188:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. * * *
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

As for a judge who has fully participated in plea bargaining with a defendant, acknowledging and confirming promises made by a prosecutor, and before whom that defendant enters a plea of guilty, the requirements of *Santobello* are even more compelling in regard to the

fulfillment of those promises. Nor can these promises or the requirements of *Santobello* be abrogated by the subterfuge of re-assigning the petitioners' cases to another judge who had not participated in the plea bargain since such promises are binding not only upon the individual making them, but also upon the entire office represented by that person. As stated by this court in *Santobello* at 404 U.S. 262:

> "* * * The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact."

The foregoing is equally applicable to judges presiding in the same court.

CONCLUSION

The petition for a writ of certiorari should be granted and the criminal indictments now pending against the petitioners should be dismissed *ipso facto*, since the petitioners cannot be returned to their *status quo ante*.

Respectfully submitted,

M. SHAD HANNA
Attorney for Petitioners

APPENDIX

EXHIBIT A

Decision on Merits of Court of Appeals

(Filed October 16, 1972)

No. 1067

IN THE COURT OF APPEALS
FOR WOOD COUNTY, OHIO

STATE, *ex rel.*, RONNIE WOODBURY
& THOMAS WOODBURN,
Plaintiffs,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney, etc.,
Defendant

JUDGMENT ENTRY

This cause came on to be heard upon the complaint in mandamus and alternative writ to show cause. Plaintiffs present by counsel, M. Shad Hanna; defendant Daniel T. Spitler present in person and in his own behalf.

For want of time no answer having been filed, plaintiffs' motion for judgment for failure to file answer overruled. Defendant given leave to file answer instanter (Sec. 2731.09 R.C.). Oral argument presented by counsel for the parties; evidence adduced.

Finding that the defendant, in open court, affirmed that he would follow the direction of the Supreme Court of Ohio in the case of State, ex rel., Woodbury v. Coller, Judge, No. 72-208 (cited as 31 Ohio St. 2d. 195); and finding that the complaint in mandamus is premature, motion for peremptory writ overruled, motion for new party defendant overruled, and complaint dismissed at plaintiffs-relators' costs.

/s/ JOHN W. POTTER
Presiding Judge

/s/ CLIFFORD F. BROWN
Judge

/s/ FRANK W. WILEY
Judge

EXHIBIT B

Opinion of the Ohio Supreme Court

(Decided May 23, 1973)

No. 72-808

SUPREME COURT OF THE STATE OF OHIO

THE STATE, EX REL., WOODBURY ET AL.,
Appellants,

v.

SPITLER, PROSECUTING ATTORNEY,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR WOOD COUNTY.

On October 13, 1972, appellants, Ronnie Woodbury and Thomas Woodbury, sought, in the Court of Appeals, a writ of mandamus compelling appellee, Daniel Spitler, prosecuting attorney of Wood County, to dismiss certain criminal indictments pending against appellants in accordance with a plea-bargaining agreement between appellants and appellee.[1]

The Court of Appeals issued an alternative writ of mandamus, commanding appellee to perform in accordance with the prayer of appellants' complaint, or to show cause why he had not done so at a hearing to be held at 9:15 a. m., on October 16, 1972. Prior to the hearing, appellants filed

---

1. Appellants are defendants in multiple count criminal indictments and are presently awaiting trial.

a motion to add new party defendants and to amend their complaint in regard thereto by interlineation.

No answer or other response having been filed or made by appellee prior to commencement of the hearing, appellants moved for a peremptory writ of mandamus. Appellee requested leave to prepare and file his written answer, stating that he was prepared to proceed orally on the merits at that time. The court took all motions and requests under advisement and proceeded with the hearing on the merits.

Upon conclusion of the hearing, the court overruled each of appellants' motions; granted appellee leave to file his answer instanter; and found that the mandamus action was premature in that the appellee affirmed in open court that he would comply with the terms of the plea bargaining agreement at the commencement of the trials. The court dismissed the complaint. Subsequently, the appellee filed his written answer.

The cause is now before this court upon appeal as a matter of right.

STERN, J. It is appellants' contention that if no answer or other pleading is made or filed to an alternative writ of mandamus prior to commencement of the hearing on such writ, a peremptory writ of mandamus must be allowed and issued forthwith against the party to whom the alternative writ was issued. Appellants base this contention on the language of R. C. 2731.10, which provides: "If no answer is made to an alternative writ of mandamus, a peremptory mandamus must be allowed against the defendant."

The crux of this case turns upon the meaning of the word "answer," as used in R. C. 2731.10, and the discre-

tion allowed a court in regard to this matter. Appellants would have us hold that an answer must be made in written form prior to commencement of the hearing, and that the court lacks discretion to allow an unwritten answer. In support of that argument appellants cite the following cases: *State, ex rel. Wiegel, v. Randall* (1953), 160 Ohio St. 327; *State ex rel. Baxter, v. Manchester* (1944), 143 Ohio St. 48; *State, ex rel. Clifton, v. Howard* (1929), 121 Ohio St. 607; *State, ex rel. Clemmer & Johnson Co., v. Turner* (1916), 93 Ohio St. 379; and *State, ex rel. Otenberger, v. Hawes* (1885), 43 Ohio St. 16.

Although the word "answer," as used in regard to pleadings, would normally imply a written answer, we do not feel that a proper reading of those cited cases, or logic, necessitates such a narrow holding in this instance. As indicated by the record herein, the appellee was not served a copy of the alternative writ of mandamus until late on the afternoon of Friday, October 13, 1972, and the hearing was to be held at 9:15 a. m., Monday, October 16, 1972, thereby allowing little time for the preparation and filing of a written answer.

Under such circumstances, in proceeding with the hearing to the extent necessary to determine whether appellants would be prejudiced by not having previously been given a written answer, the court did not abuse its discretion. Nor was it prejudicial error for the court to proceed to a final determination on the merits and permit a subsequent filing of a written answer by appellee.[2]

---

2. Appellants do not contend that they were confronted with any new material either by the oral answer or by the subsequent written answer, nor do they contend that they were deprived of the opportunity to adequately prepare an argument contra to appellee's oral answer.

Indeed, the crux of the answer presented by appellee at the hearing was an affidavit signed by the appellee in which he acknowledged that proper plea bargaining had occurred, and stated that he would comply with all the provisions of the plea-bargaining agreement and that he "* * * is prepared to proceed with prosecution * * * and will not use as evidence against the defendant[s] any statements or admissions or evidence resulting from such statements or admissions given by the defendant[s] to the prosecution as a result of plea bargaining."

That assurance by appellee was previously made before this court in the case of *State, ex rel. Woodbury, v. Coller* (1972), 31 Ohio St. 2d 195, which involved issues substantially the same as those presented herein. As stated therein, at page 196: "Prohibition will not lie as to a prosecutor who is duty bound to proceed to prosecute pursuant to indictment. *The prosecuting attorney will be required to carry out any proper agreements entered into with defense counsel* which were relied upon by appellants to their prejudice. The prosecuting attorney, in oral argument before this court, asserted his intention to carry out completely such agreements." (Emphasis added.)

In view of the foregoing, we agree with the Court of Appeals that this writ was improvidently sought. Extraordinary remedies, *i. e.*, mandamus, prohibition and habeas corpus, are available only when usual forms of procedure are incapable of affording relief. They may not be employed before trial on the merits, as a substitute for an appeal for the purpose of reviewing mere errors, or irregularities in the proceedings of a court having proper jurisdiction, or as a means for testing the constitutionality of a statute in favor of one who has been convicted or who has charges pending against him where the court wherein

the criminal cause is pending or conviction was obtained had jurisdiction to determine the question of constitutionality.[3]

This writ of mandamus, having been sought on the basis of anticipation of an omission of duty, was properly denied, and the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, *C.J.*, HERBERT, CORRIGAN, CELEBREZZE, W. BROWN and P. BROWN, *JJ.*, concur.

HERBERT, *J.*, concurring. I concur, but believe that we could have reached the same result without citing R. C. 2731.10. That statute should not be construed as controlling the exercise of original jurisdiction in mandamus constitutionally granted to Courts of Appeals and this court.

---

3. See 63 American Jurisprudence 2d 260, Prohibition, Section 31; 52 American Jurisprudence 2d 333 and 334, Mandamus, Sections 4 and 5; 39 American Jurisprudence 2d 186, Habeas Corpus, Section 12.

EXHIBIT C

Decision on Merits of Ohio Supreme Court

(Filed June 20, 1973)

No. 72-808

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *ex rel.*
RONNIE WOODBURY *et al.*,
Appellants,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR WOOD COUNTY

This cause, here on appeal from the Court of Appeals for Wood County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Appeals to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Wood County for entry.

THOMAS L. STARTZMAN
Clerk

EXHIBIT D

Decision on Rehearing of Ohio Supreme Court

(Filed June 20, 1973)

No. 72-808

THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO, *ex rel.*
RONNIE WOODBURY *et al.*,
Appellants,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney, Wood County,
Appellee.

REHEARING

It is ordered by the court that rehearing in this case is denied.

EXHIBIT E

Mandate of Ohio Supreme Court

(Filed June 20, 1973)

No. 72-808

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *ex rel.*
RONNIE WOODBURY, *et al.*,
Appellants,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney,
Appellee.

MANDATE

To the Honorable Court of Appeals Within and for the County of Wood, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1973
No. 73-327

STATE OF OHIO, *ex rel.*
RONNIE WOODBURY AND THOMAS WOODBURY,
Petitioners,

vs.

DANIEL T. SPITLER, Prosecuting Attorney
of Wood County, Ohio,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

M. SHAD HANNA
HANNA & HANNA
700 North Main Street
Bowling Green, Ohio 43402
(419) 352-6501
Attorney for Petitioners

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

Supreme Court of the United States

October Term, 1973
No. 73-327

STATE OF OHIO, *ex rel.*
RONNIE WOODBURY AND THOMAS WOODBURY,
Petitioners,

vs.

DANIEL T. SPITLER, Prosecuting Attorney
of Wood County, Ohio,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

FACTS

In reading the Statement of Facts as contained in the Petitioners' Petition for Writ of Certiorari and Respondent's Brief in Opposition, it appears that the parties are at least in agreement as to the following: (1) a plea bargain agreement was entered into by the Petitioners, Respondent and trial Judge, Floyd A. Coller, wherein the Petitioners would plead guilty to one count of multi-count indictments and would cooperate with the Respondent and trial Judge thereafter, (2) that the Respondent and trial Judge were to dismiss the other counts in the multi-count indictments, after the Petitioners had pled guilty, (3) that the Petitioners fulfilled their part of the agree-

ment by entering a plea of guilty to one count of the multi-count indictments and thereafter cooperated with the Respondent and trial Judge, and (4) that the trial Judge and Respondent have not fulfilled their part of the agreement to date.

In addition to the foregoing, the Respondent has set forth new facts in his Statement of Facts set forth in his Brief in Opposition, to the effect that the trial Judge withdrew the Petitioners' guilty pleas on his own Motion and because of this action by the trial Judge, the Respondent maintains that neither he nor the trial Judge are now obligated to keep or fulfill their agreement with the Petitioners. In this respect, the Petitioners would only point out that it should be noted that the withdrawal of the guilty pleas was done over the objection of the Petitioners and upon the Respondent and trial Judge's own Motion, and that the proceedings evidenced by Exhibit B as contained in Respondent's Brief in Opposition, do not tell the true story of the meaning of that hearing, since the full circumstances and surroundings in which that hearing was held have not been made known to this Court. In this respect, such hearing was held at 3:16 P.M. on February 1, 1971, shortly after a hearing had been held on that same date in a companion case of a Co-Defendant, not a party herein, wherein that Co-Defendant and his counsel had accused the Respondent and trial Judge of bribing the Petitioners herein by entering into the aforestated plea bargain agreement. Thus, when such hearing is viewed in the totality of the circumstances surrounding same, it was more than evident that the hearing upon the Motion of the Respondent and trial Judge was done for their benefit in view of the bribery charges and was not done with any thoughtfulness towards the Petitioners.

REASONS FOR GRANTING WRIT

In response to the Brief in Opposition filed by the Respondent herein, and upon the additional facts presented by the Respondent, the Court is presented with a situation wherein the Respondent and trial Judge have attempted to abrogate their plea bargain agreement with the Petitioners, after the Petitioners have fully performed, by destroying the consideration given by the Petitioners. However, Petitioners maintain that the agreement cannot be abrogated by the destruction of the consideration which they have given by the Respondent and trial Judge, and that the Petitioners having fully performed, the Respondent and trial Judge must likewise perform and keep their part of the agreement.

It is indeed unfortunate that the Respondent and trial Judge were accused of bribery in the companion case by the Co-Defendant and attorney in that case, for undoubtedly, if that had not occurred, this matter would not now be before this Court, as the Petitioners have no doubt that the Respondent and trial Judge would have performed their part of the agreement. Furthermore, it is unfortunate that the Respondent and trial Judge were not of such strength of character, particularly in a situation where they were in no way guilty nor should they have even been suspected of bribery, to refuse to be intimidated by the Co-Defendant and his counsel in the companion case. However, this has not been the case, and the intimidation of the Respondent and trial Judge has resulted in the unfortunate situation wherein the Petitioners herein are being denied their due process of law. Ironically, and curiously enough, the Co-Defendant and his attorney in the companion case have not been asked to

answer for such accusations, not even having been charged in contempt of Court.

Thus, in regard to *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971) wherein this Court was presented with a fact situation where the Respondent (Prosecutor) had *inadvertently* failed to keep its part of the plea bargain agreement therein, we have a much stronger factual situation here, in that the Respondent and trial Judge have *intentionally* and *knowingly* attempted to abrogate the plea bargain agreement which they entered into with the Petitioners. As was held by this Court in the *Santobello* case, a plea bargain agreement entered into by the parties in a criminal case, must be performed by those prosecuting, where a Defendant has performed his part of that agreement, and this is all that the Petitioners seek to accomplish here.

The Petitioners would not argue with the Respondent or trial Judge in that if the Petitioners themselves had requested that their guilty pleas be set aside, that they would now be estopped from requesting the Respondent and trial Judge to perform the plea bargain agreement. However, there is a definite distinction between that situation and the situation which has arisen here, in that the consideration to be given and which was given by the Petitioners was not destroyed by them or by their own actions, but was destroyed by the Respondent and trial Judge upon their own Motion. Petitioners submit that this is a significant distinction, in that if the Respondent and trial Judge are allowed to act in this manner, then no Defendant can be assured that the Prosecutor and trial Judge will perform their part of the bargain once he has performed his part of the bargain, since the Defendant will know that the Prosecutor and trial Judge may, if they so desire and for their own personal reasons,

destroy the consideration given by the Defendant, and thus abrogate the plea bargain agreement. Petitioners submit that without question, where they have performed their part of the agreement, including submitting themselves to lie detector tests, giving sworn statements before a Court Reporter, and appearing at Court to testify, all done on behalf of the Respondent (Prosecutor), that they cannot now be returned to their original position, and that to attempt to do so can only result in the denial of their due process of law.

Respondent has submitted that he is willing to go forward with the plea bargain agreement provided the Petitioners enter a new plea of guilty, which the Petitioners submit in essence is nothing more than a request by the Respondent to have the Petitioners enter into a new plea bargain agreement. Obviously, where the Petitioners have already given sworn statements, submitted themselves to lie detector tests and appeared at Court to testify, they cannot be placed in the same bargaining position as they were in at the time the original plea bargain agreement was entered into by the parties. Thus, again, they would be denied their due process of law if required to enter into a new plea bargain agreement.

However, noting that this matter has gone on now for over three years, the Petitioners would enter into a new plea bargain agreement, if there was an assurance on the part of the Respondent, that they, in fact, would receive the same agreement, treatment and disposition of their case that James Falls received, he being the other Defendant who entered into the same plea bargain agreement as the Petitioners did and as is the subject matter herein. However, the Respondent has continuously suggested to the Petitioners, that although he would recommend the dismissal of the remaining charges of the multi-

count indictments, if the Petitioners should plead guilty to one count, he has also consistently stated that he would not recommend probation as he did for James Falls, nor did he have any assurance that the trial Judge would allow him to dismiss the remaining counts. Therefore, although the three Defendants (two Petitioners herein and James Falls) all entered into the same plea bargain agreement, and although the Respondent has performed in such a manner as to conclude the agreement on the part of one of such three Defendants (James Falls), the Respondent has not offered to conclude the same agreement with the Petitioners in the same manner.

Petitioners at all times herein and before the other Courts which have heard this matter, have consistently attempted to obtain an Order which would place them and the Respondent and trial Judge in the same position which they would have been in if the Respondent and trial Judge had performed their part of the agreement. In this respect, the Petitioners entered a plea of guilty pursuant to the plea bargain agreement on January 4, 1971, and were remanded to the County Jail to await sentencing and dismissal of the other charges. Despite the fact that the Petitioners remained in jail for a period of four weeks, which was more than sufficient time for the Respondent to dismiss the remaining charges and for the trial Judge to conclude sentencing, the Respondent and trial Judge did not perform in this respect. Thus, if the Respondent and trial Judge had timely performed their part of the plea bargain agreement, the Petitioners would have been sentenced and the remaining counts would have been dismissed prior to such time as the Respondent and trial Judge were accused of bribery on February 1, 1971. Consequently, with the withdrawal of the guilty pleas of the Petitioners on the Motion of the Re-

spondent and trial Judge, the Petitioners would have been in the position where they would be faced with one count pending against them, which is exactly the same position they would be in if this Court should find that the Respondent and trial Judge are ordered to perform their part of the plea bargain agreement by dismissing the remaining counts of the indictments.

It should further be noted that in the original Petition for a Writ of Mandamus filed in the Court of Appeals for Wood County, Ohio, the Petitioners moved the Court to make the trial Judge a party thereto, which Motion was denied, thus precluding the Petitioners from a full hearing upon the merits to determine whether or not there was, in fact, a plea bargain agreement and, if so, who the parties were to that agreement.

Petitioners, for the foregoing reasons, respectfully submit to the Court that a Writ of Certiorari should issue herein so that the Petitioners may be granted due process of law and so that the integrity of the plea bargain agreement system of disposing of cases can be preserved.

Respectfully submitted,

/s/ M. SHAD HANNA
Attorney for Petitioners